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Supreme Court of the United States

OCTOBER TERM, 1952

No. 226

J. LAURITZEN,

Petitioner;

against

EVALD JOHANN LARSEN,

Plaintiff-Respondent.

PETITIONER'S REPLY BRIEF

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The plaintiff-respondent's brief is noteworthy for its avoidance of the point made by petitioner that the terms of the Jones Act were not intended to be applicable to a factual situation such as is presented here. It cites no authority and makes no argument to maintain its position that the facts involved were such as to require the Court to take jurisdiction and allow the plaintiff-respondent to maintain an action in our courts under the Jones Act rather than relegating him to a recovery under the Danish law, the law of the flag. Nor does his brief cite any authority to show that the Jones Act was specifically intended to cover injuries sustained abroad by a foreign seaman signing on a foreign ship in a United States port, or that it was intended to supplant the traditional law of the flag rule in such situations.

The Facts

1. The question presented in this petition has not, prior to this case, been presented either to this Court or directly to the Court of Appeals for the Second Circuit. Not only was the denial of a petition in *Taylor* v. *Atlantic Maritime Co.*, 179 F. (2d) 597, 1950 A. M. C. 352 (2 Cir., 1950), cert. den. 341 U. S. 915, 71 S. Ct. 736, not a review of the decision therein (plaintiff-respondent's brief 1), but the *Taylor* case dealt with the signing-on of an entire crew in an American port and with alleged continuing negligence (causation or aggravation of tuberculosis) which, under the doctrine of *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368 (1932) commenced at the port of sign-on.

Furthermore, the denial of certiorari in the *Taylor* case, involving an interlocutory order such as would ordinarily not be appealable even in admiralty, since it did not finally determine the rights of the parties, is no authority in a situation such as presented here, where a final judgment was entered.

Finally, if denial of certiorari is in itself important, the denial of certiorari in the Supreme Court in *Sonnesen* v. *Panama Transport Co.*, 298 N. Y. 268, 82 N. E. (2d) 569 (1948), cert. den. 337 U. S. 919, 69 S. Ct. 1157, where the Court of Appeals of the State of New York held that foreign law was to be applied to a seaman signing on a foreign ship in the port of New York who was injured on the high seas rather than the Jones Act, is in point both to show that petitioner is correct and to point out that this is a situation where there has been a direct conflict of decisions on a federal question between a United States Court of Appeals (*Taylor* v. *Atlantic Maritime Co.*, *supra*) and the highest court of a state (*Sonnesen* v. *Panama Transport Co.*, *supra*). Petitioner urges that such a direct conflict exists. Counsel for plaintiff-respondent admits its existence and calls it an "obvious divergence" (p. 16). It is urged that the

divergence and conflict existing between the ruling of the United States Court of Appeals for the Second Circuit in the instant case, and the decision of the Court of Appeals of the State of New York warrants a review by this Court as the final arbiter of matters of federal law decided by either federal or state courts.

2. Respondent has deliberately misstated the record in saying that plaintiff-respondent signed articles to serve aboard the s/s Randa for a voyage from and to New York. The articles do not state this. The misstatement is further amplified by plaintiff-respondent's statement that the articles show that not one seaman signed off or on in Denmark (Defendant's Exhibit A, 44-45). Plaintiff-respondent's counsel did not notice that only a part of the articles are printed as may be seen by the fact that only pages 8 and 9 were reproduced (upper left and upper right hand corners of second page of Defendant's Exhibit A). Also, as shown in column 10 of pages 8 and 9 of Defendant's Exhibit A, while most crew members signed on for an indefinite period, one man on those pages reproduced signed on for a voyage only from Havana to the United States (Defendant's Exhibit A, column 10, 4 lines from bottom, 45). There is nothing in the record to indicate the extent of the voyage for which the respondent signed on beyond the terms of the articles which called for a voyage to "South America and other places" and the pre-trial order which stated that the plaintiff signed articles and shipped from the port of New York for a voyage to South America and other places (16). In addition, the plaintiff-respondent testified at page 47 that he was bound to serve aboard the vessel for an indefinite period of time with the right to leave the vessel on 7 days' notice. The Court's attention is called to the exchange between the Trial Judge and counsel for the plaintiff-respondent as recorded at pages 48 and 49 of the record, where the Trial Judge indicated that the wording of the pre-trial order did not deal with the "scope of the voyage", but merely stated the fact that the vessel finally got to New York.

The fact that two seamen listed on pages 8 and 9 of the Defendant's Exhibit A, who signed aboard the vessel in New York at the same time as Larsen, also signed off in New York 7 days after Larsen's injury in no way indicates that this was a voyage from and to New York. The terms of the articles signed by these two seamen made it possible for them to sign off the vessel merely by giving 7 days' notice of such intention to the master (Defendant's Exhibit A, 44, 45). Under such terms, therefore, any seaman could have signed off at *any port*, regardless of the port at which he signed on.

It seems strange to find this preoccupation on the part of counsel for the plaintiff-respondent on the question of the exact scope of the voyage involved, for counsel has stated repeatedly in plaintiff-respondent's brief that the pivotal point in determining whether the Jones Act is to apply or not is whether the place of sign-on was a United States port.

3. Foreign articles have never been held void by our courts. Petitioner cites no authority that articles such as were signed here are void (page 2 of plaintiff-respondent's brief), which is proof in itself that the policy of Congress and our courts has been that American statutes are not to be construed to apply to the internal affairs of foreign vessels.

4. In stating that plaintiff-respondent has received no benefits under the Danish law, counsel ignored plaintiff-respondent's testimony, Defendant's Exhibit D (91), and also Defendant's Exhibit C (20, 21, 89), which was a stipulation as to the terms of the Danish law signed by the attorney for plaintiff-respondent. The record will substantiate that plaintiff-respondent was duly cared for until he was able to return to work, all in accordance with the requirements of Danish law.

5. Counsel for the plaintiff-respondent has pointed out that no objection was made to the "propriety or jurisdiction of the service" of the summons and complaint herein (page

3). This is a novel point, since the petitioner does not question the Court's jurisdiction over the petitioner, but does question the jurisdiction of the Court over the plaintiff-respondent's cause of action under the Jones Act. The petitioner urges that the plaintiff-respondent is not entitled to the benefits under the Jones Act since he is a foreign seaman serving aboard a foreign vessel, but the petitioner has never sought to raise the point that initial jurisdiction over the petitioner itself was bad.

6. While it is true that the Trial Court ruled that the Danish law was not to be given effect (113, 114), it is not true that the jury found that there was no valid agreement to be bound by Danish law, for the Trial Court refused to permit this question to be placed before the jury and refused to permit the jury to consider any questions whatsoever involving the applicability or the effect of the Danish law (113, 114).

The Law

1. Plaintiff-respondent's argument that the Jones Act should be construed to apply to a foreign seaman signing on a foreign vessel while in an American port is apparently based on the argument that such a construction would indirectly subsidize the American Merchant Marine, and not that such a construction is necessary to comply with the terms of the Jones Act and insure justice in this action. Plaintiff-respondent was cared for by petitioner after his accident until he was ready to return to work, all in accordance with the Danish law, but counsel argues that plaintiff-respondent is entitled to still further benefits in accordance with American law in order to equalize operating conditions between American and foreign vessels (pages 4-6 plaintiff-respondent's brief). However, plaintiff-respondent ignores our national policy against indirect subsidy to shipping as shown by the Merchant Marine Act of 1936 (46 U. S. C. A., Sect. 1101), and the Congressional reports.

Prior to the passage of the Merchant Marine Act of 1936, Congress had provided aid to American shipping in the form of lending money at low rates of interest to the American shipping companies for the purpose of building new ships for foreign trade. Congress had, in addition, appropriated large annual sums under the guise of payments for ocean-mail contracts. Plaintiff-respondent now seeks to have the Court construe the Jones Act as applying to foreign seamen in order to give American shipowners an additional subsidy. However, President Roosevelt, in his Message to Congress on the Merchant Marine Act of 1936, dated March 4, 1935, in speaking of the difference between the ocean-mail payments actually made and the reasonable cost of such service, stated (74th Congress, House Document No. 118, p. 2):

> "The difference, $27,000,000, is a subsidy, and nothing but a subsidy. But given under this disguised form it is an unsatisfactory and not an honest way of providing the aid that Government ought to give to shipping.
>
> *I propose that we end this subterfuge.* If the Congress decides that it will maintain a reasonably adequate American Merchant Marine I believe that it can well afford honestly to call a subsidy by its right name." (Emphasis supplied.)

It is submitted, that for the Courts of the United States to attempt to reduce the burden of the United States taxpayer by subjecting foreign shipowners to higher insurance rates for personal injury coverage would be to resort to that very form of "subterfuge" which the Merchant Marine Act of 1936 was explicitly designed to avoid. The decisions of our Courts have no place within this province.

2. Reference to agents for foreign vessels in United States ports (plaintiff-respondent's brief, page 6) as a reason for applying all American statutes to internal affairs of foreign vessels, fully overlooks the point that American vessels trading to foreign ports use agents and subsidiary corporations in these foreign ports, without which operations would be impossible.

The question of local interference in domestic affairs of vessels engaged in international trade is a two-way street. If we are to concede that the internal affairs of a foreign vessel in a United States port are to be governed by United States law, then we must be prepared to admit that our vessels may also be subject to local interference at every foreign port of call.

The figures on United States vessels engaged in international trade, cited on page 5 of plaintiff-respondent's brief, are very significant since they show that the numbers and the tonnage of American vessels exceed those of foreign ships, so the overall picture indicates that an extension of the application of local laws would harm the American Merchant Marine more than the foreign merchant marine.

The foreign trade figures on page 5 also indicate the far reaching effect a decision on this point would have. They lend support to petitioner's contention that the issue and question presented to this Court by the petitioner is a substantial one which will have a profound effect upon a large number of shipowners engaged in trade to and from United States ports, and that it is an important federal question worthy of a decision by the Supreme Court of the United States.

3. The cases cited by counsel for the plaintiff-respondent under Point II on pages 7, 8 and 9 have been dealt with fully in the petitioner's brief in support of its petition, wherein it was pointed out that *Patterson* v. *Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002 (1903), and *Strathearn S.S. Co.* v. *Dillon*, 252 U. S. 348, 40 S. Ct. 350, 64 L. Ed. 607 (1919), both involved the constitutionality of United States statutes which Congress had expressly specified should be applicable to foreign vessels. As was pointed out in that brief, these cases find no parallel in the instant one, since in the Jones Act and its legislative history we find no indication of an intent on the part of Congress to make its terms applicable to alien seamen aboard foreign vessels who are injured in foreign ports.

4. *The Titanic*, 233 U. S. 718, 34 S. Ct. 754, 58 L. Ed. 1171 (1913), cited on page 8 of plaintiff-respondent's brief, held only that a foreign shipowner who was sued in the United States was entitled to the benefits of the United States statutes limiting his liability, such statutes having been made *specifically applicable* by their terms to foreign, as well as American shipowners.

5. It is not contended on behalf of the petitioner that the law of the flag is a sacred doctrine superior to the law of our land in all instances, as is supposed by counsel for plaintiff-respondent (page 9). It is urged, however, that whenever there is a conflict between the law of the flag and the law of the forum, the determination of which shall be paramount hinges upon whether the matter involves the internal rights and duties of the crew towards the vessel, or whether it is a matter which so affects the peace and tranquillity of the port as to require the application of the law of that port. This distinction finds full support in the cases cited under Point III of the petitioner's brief in support of its petition.

6. *Stewart* v. *Pacific Navigation Co., Ltd.*, 3 F. 2d 329 (S. D. N. Y., 1924), dealt only with the venue provision of the Act. There is no reason for counsel for the plaintiff-respondent to express surprise and to feel that Judge Learned Hand's approaches on the *Stewart* case and *Kyriakos* v. *Goulandris*, 151 F. (2d) 132, 1945 A. M. C. 439 (2 Cir., 1945) are contradictory, since the former case involved only the question of whether an *American* seaman serving aboard a foreign vessel could sue the owners of that vessel in the United States. That was not the problem which was before the Court in the *Kyriakos* case and is not the problem presently before this Court.

7. *O'Donnel* v. *Great Lakes Co.*, 318 U. S. 36, 63 S. Ct. 488 (1943), cited by plaintiff-respondent on page 11 of the brief, applied the Jones Act as the law of the flag of the ship, since this was the applicable law rather than the

law of the port of call. This, of course, is in accord with the petitioner's position here.

8. The articles here were valid. While the articles such as signed here would, according to plaintiff-respondent, be invalid as applied to an American crew signing on an American vessel in American waters, still it has never been contended that the statutes relating to the form of articles should apply to foreign vessels, such as the s/s Randa, signing on foreign seamen in American ports. This is a recognition of the fact that there are certain matters which should more properly be left to be dealt with by the provisions of the law of the flag of the vessel. *The Quoge*, 261 Fed. 414, aff'd 266 Fed. 696 (4 Cir., 1920), cited on page 12 of plaintiff-respondent's brief, is inapplicable since it dealt with the validity of articles to serve aboard an American vessel, which articles were, of course, required to conform to the appropriate United States statutes.

9. *Farrell* v. *United States, et al.*, 336 U. S. 511, 34 S. Ct. 754, 58 L. Ed. 1171 (1949) where a seaman, who was permanently injured without fault by the ship and beyond hope of improvement, was held not to be entitled to maintenance and cure, was cited in petitioner's brief to show that, as applied to certain situations, the American concept of maintenance and cure was not as liberal as foreign law, which requires medical treatment and care of a seaman regardless of negligence. By reason of the lack of negligence, Farrell had no right to any indemnity or lump sum recovery under the Jones Act. In a similar situation under the Danish law, where negligence plays no part, Farrell would have been entitled to a substantial sum for his permanent condition.

10. The decisions in *Kyriakos* v. *Goulandris, supra*, *Taylor* v. *Atlantic Maritime Co., supra*, and *O'Neill* v. *Cunard White Star Ltd.*, 160 F. (2d) 446, 1947 A. M. C. 505 (2 Cir., 1947) have already been fully dealt with in petitioner's main brief.

11. If the decision of the Court of Appeals for the Second Circuit in the present case is deemed to remove inequality among seamen, as is urged in plaintiff-respondent's brief, it certainly will have the very opposite effect.

If two alien seamen aboard a foreign vessel should sustain simultaneous injuries aboard the vessel due to the same negligent cause, then under the present ruling the one who signed articles in other than an American port would be entitled to the benefits of the foreign law and could not proceed under the Jones Act, whereas the one who signed on in a United States port would be entitled to recover under the terms of the law of the flag and apparently could also proceed in our courts under the Jones Act, all because of the fortuitous circumstance that the latter was temporarily in the United States on an alien seaman's temporary visa at the time he joined the vessel. Yet these two men signed the same articles, agreed to be bound by the same terms, were subject to the same discipline, and in every way lived the same lives and were exposed to the same hazards.

12. Counsel for plaintiff-respondent in his brief stresses the alleged inequality existing between American and foreign seamen, and urges that the Jones Act should be applied since it is more liberal to the seamen. It is urged on behalf of petitioner that those are not valid arguments for applying the Jones Act to the factual situation herein. The real question, which counsel for plaintiff-respondent has avoided in his brief, is whether the Jones Act was by its terms intended to be applicable to a foreign seaman, who is injured in a foreign port after signing-on a foreign vessel in a United States port, when that seaman recovered the benefits to which he was entitled under the law of the flag.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of the petition.

Dated: New York, N. Y., September 12, 1952.

Respectfully submitted,

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